Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

JACKIE K. STEELE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED FOR REVIEW

Mr. Steele's Criminal Convictions For Witness Tampering Should Be Reversed For Both Factual And Legal Reasons.

The Government's Failure To Disclose Its Alibi Rebuttal Witness Violated Rule 12.1(b) Of the Federal Rules Of Criminal Procedure And Denied Mr. Steel Due Process Of Law.

The Seventh Circuit Court Of Appeals Allowed Prejudicial Hearsay Testimony Contrary To This Court's Decision In Bourjaily v. United States.

The Seventh Circuit Approved The Prosecution's Failure To Disclose Favorable Material Evidence Contrary To This Court's Requirement's Under Brady v. Maryland.

The Decision Of The Seventh Circuit Ignores The Government's Wilful Violation Of Its Due Process Duties By Creating The False Impression That Mr. Steele's Alibi Witness Was Lying About Whether She Worked On The Night In Question And In Refusing To Correct That False Impression After Learning It Was False.

The Evidence Did Not Support Setting Mr. Steele's Base Level For Sentencing On The Malicious Damage Offense At Level 24 Rather Than At Level 20.

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OPINION BELOW

On August 7, 1996, the Court of Appeals for the Seventh Circuit issued its opinion and decision affirming Mr. Steele's convictions and sentences for malicious damage to property, witness tampering and mail fraud. On January 13, 1997 the Court denied his Petition for Rehearing.

JURISDICTIONAL STATEMENT

Mr. Steele filed a timely appeal to the Seventh Circuit Court of Appeals from his conviction in the United States District Court for the Northern District of Indiana. A timely Petition for Rehearing was denied. A Writ of Certiorari is now sought in the Supreme Court of the United States.

Proper Notice has been served pursuant to Supreme Court Rule 29.4 where the United States is a party.

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Statement of the Case

This case involves the prosecution of Jack Steele for malicious damage to property, witness tampering and mail fraud. The prosecution arose from the investigation of an attempted arson at a car dealership.

On December 28, 1990, someone attempted to destroy the Zaragoza Oldsmobile dealership in Gary, Indiana, by arson. (Tr.118). The arson failed and no one was injured. (Tr.737). Gerald Altier, a "silent partner" in the dealership later admitted to the crime and implicated Jack Steele, a used car wholesaler who provided cars to the dealership only on consignment.(Tr.571). Altier alleged that John Zaragoza, and Jack Steele plotted the arson attempt for insurance proceeds. Mr. Steele denied any involvement (Tr.1098) and submitted alibi evidence that at the time of the attempt, he was at the Terrace Inn in Oak Forest, Illinois.(Tr.1081). Mr. Steele had no ownership interests (Tr.132) in the dealership nor were his consigned cars covered by any insurance.(Tr.421).

The following pertinent evidence was adduced at trial:

Since 1977 Jack Steele has been in his own automobile business (Tr.1014), buying andselling cars at dealerships and auctions. In late 1989, Both Altier and Zaragoza asked

Mr. Steele to supply used cars on consignment .(Tr.1028). Since Mr. Steele moved his cars from state to state, the cost of carrying his own insurance was prohibitive and Zaragoza agreed to provide the insurance. (Tr.1029). Mr. Steele's cars were never covered under the dealership's policy because he retained title until a car was sold. (Tr.421).

The dealership opened with new cars from GMAC and 15 or 20 used cars on consignment from Mr. Steele. (Tr.547). As a car was sold, Mr. Steele would provide the title.(Tr.1036). He did not receive any money from the dealership other than for the sale of his cars. (Tr.132).

The Zaragoza dealership was in dire financial trouble from the beginning, (Tr.133) beginning to bounce checks for payroll and to GMAC. (Tr.451,136) shortly after opening. As a result GMAC halted shipments of new cars. (Tr.230). When the dealership was cut off by GMAC, Altier and Zaragoza purchased cars from the Florida Auto Auction and Walden Leasing. (Tr.146) The checks for these cars also bounced. Zaragoza was able to sell these cars but the purchasers could not get titles since neither Florida Auto Auction nor Walden Leasing, would release the titles.(Tr.557).

In mid 1990, Mr. Steele loaned the dealership $70,000 and was given 736 shares

of General Electric stock as security. He had trouble collecting repayment, so he would "bug" Altier constantly, calling him at home early in the morning or late at night.(Tr.1039). Upon repayment Mr. Steele returned the stock to Zaragoza. (Tr.1058).

To insure that Mr. Steele would be paid, Zaragoza opened a joint bank account with him.(Tr.1043). When Zaragoza sold a consignment car, the customer's check would be deposited and checks would be issued to Mr. Steele and Zaragoza or their shares. Altier agreed to this because he knew Mr. Steele could easily remove and sell his cars at a nearby auction, which would close the dealership. (Tr.656).

By November, the dealership was unable to pay its bills. Zaragoza's November 7th check for $4,460.00, the initial premium for the 1990-91 insurance, bounced. (Tr.419). Altier borrowed $24,000.00 from Mr. Steele, to be repaid in early December, to cover various bills, including GMAC, some automobile repair shops and the overdue insurance premium. (Tr.648). That policydid not include any coverage for Mr. Steele's consignment cars. (Tr. 421, 1055, 421). At the time Mr. Steele paid the premium there had not been any discussions about plans to destroy the dealership. (Tr.650).

Mr. Steele became upset with the dealership since he had not been repaid, and

because employees were personally using his cars. (Tr. 654, 657.) When he threatened to remove his cars (Tr.1057) in December, Zaragoza gave Steele the same $67,000 worth of General Electric stock as collateral. (Tr. 1058). Zaragoza repeatedly assured Mr. Steele that the dealership would soon obtain a "cap" loan for operating capital and to repay Mr. Steele. (Tr.1056, 570). Had Mr. Steele been aware of any plans to destroy the dealership, he would have removed his cars. (Tr.1062).

On December 17, Altier told Mr. Steele to fill out consignment sheets and invoices on consignment cars for the dealership's log book prior to the end of the year.(Tr.1065). Since Illinois law, with which Steele was familiar, required that a record be maintained of consigned automobiles in a "police log," Mr. Steele believed Altier. (Tr.1065). Altier did not mention insurance coverage on the consigned cars.(Tr. 1065). The invoicing of the cars on a consignment basis would not - in absence of a transfer of title - have been sufficient to obtain insurance coverage. (Tr.421,423). The word "consignment" was written on the invoices. (Tr.1067). There was no effort to conceal this procedure.(Tr.1066). Mr. Steele returned to Alabama on December 21 to spend Christmas with his son. (Tr. 1071,1108).On December 26, Mr. Steele returned to the Chicago area in order to sell a car, try to

collect his $24,000 and to visit friends.(Tr. 1072,1073). Before arriving, he called his sometime employee, Ron Delisi, to check for messages and to ask Delisi "to get me a room."(Tr.798). Mr. Steele did not tell Delisi where, or where not, to get the room. (Tr.1064). Steele did not suggest that Delisi register the room in his own (Delisi's) name.(Tr.1074).

At 7:00 a.m. on December 27, Steele called Altier to demand payment and to inquire if any consignment cars had been sold.(Tr. 1076,1114). He called Altier in the early morning or late at night, because Altier was difficult to reach. (Tr.1117). Altier said that he was "trying to get it together."(Tr. 1077). Later in the day Mr. Steele arranged to see Lorraine Hutchinson. (Tr. 1080). She was employed as a secretary and also on a part time basis at Traverso's Restaurant.(Tr.980-81). Mr.Steele said that he might see her there that evening. (Tr.983) She stayed at Traverso's until about midnight but Mr. Steele did not show up.(Tr.984). As she was driving home around 12:30 a.m. she stopped at the Terrace Inn. (Tr.984). Mr. Steele was in his room so she stopped to visit. She left for home somewhere between 5:30 a.m. and 6:00 a.m. (Tr. 986).

At 5:59 a.m., Mr. Steele placed a harassing telephone call to Romayne Baker, the new boyfriend of Steele's former

girlfriend. At 6:00 a.m. he again called Altier to demand payment.(Tr.1082). Altier called back at 9:00 a.m. to say there had been "a vandalism deal" at the dealership and that kerosene had been sprinkled in Mr. Steele's cars.(Tr.1083). Altier assured Steele that he would take care of things. (Tr. 1086).

On the night of December 27 there was a severe snow storm and the area roads were treacherous. (Tr.490,510). At 5:31 a.m. on the morning of December 28, 1990 - while Mr. Steele was in his room with Ms. Hutchinson (Tr.987) - Captain Dicks of the Gary Fire Department, located directly across the street from Zaragoza Oldsmobile, dispatched fire department personnel to the dealership when he heard a noise and observed a light glowing inside. (Tr.128). Upon inspectionthe police observed gasoline spread around the dealership, several gas containers, a brick, and a flare that had been extinguished by the fire department. (Tr.118). No one was present at the dealership and the buildings surrounding it were vacant. No fire was actually ignited.

On January 17, 1991 GMAC, claiming a security interest in all dealership property, seized the used cars owned by Mr. Steele. (Tr.247). Until this seizure Altier assured Mr. Steele that he was trying get the insurance company to clean the cars.(Tr.1121). Mr. Steele immediately

called GMAC to demand return of his cars. (Tr. 727,1090).

In early January, 1991 Agent Gary Dunn initiated an F.B.I. investigation of the attempted arson (Tr.776-777), interviewing Altier and Jeffrey Bunting, an employee of the dealership. When Bunting was first questioned he denied having any knowledge of the crime and proposed to take a polygraph examination. (Tr.300). On two subsequent occasions, Bunting failed to suggest that Mr. Steele was involved and once again proposed to take a polygraph examination to demonstrate his lack of any knowledge concerning the arson attempt. (Tr. 305-306). Bunting later changed his story and stated that Altier had previously said that both Mr. Steele and John Zaragoza "knew about" the arson plan. (Tr.310-311).

Gerald Altier also assured Agent Dunn that he had no idea as to who attempted to burn the dealership. (Tr.598). At trial, Bunting and Altier told stories to the jury in contradiction to their statements to Agent Dunn. Bunting testified that on the morning of December 27 Altier told him to move all of the cars from the lot into the service department. (Tr.277) Altier said that the cars were being moved inside so that the lot could be snow plowed (Tr.278), but later told him that "the place is going to go" and Jack Steele was going to take care of it. (Tr.282) Bunting did not believe Altier

"because Altier always lies." (Tr.298).

Altier claimed at trial that in early December 1990, at a meeting attended by himself, John Zaragoza, Joe Fatigato and Jack Steele, (Tr.570) Zaragoza said that "he would like to see the place burned down because he couldn't get the cap loan and he was fed up with it." (Tr. 570). The object of burning the dealership was to obtain business interruption insurance. (Tr.678). Mr. Steele, however, would not be given any of the business interruption insurance and his own cars were not covered by insurance. (Tr.667) Altier anticipated $400,000.00 in net insurance proceeds after the payment ofdebts, including Mr. Sparacio. (Tr.6663-664), which he and John Zaragoza would divide equally. (Tr.646,663). Joseph Fatigato, one of the dealership's owners, testified, denying that he attended any meeting at which Jack Steele was present during which the subject of an attempt to burn the dealership was discussed. (Tr.915) Altier knew that Mr. Steele's cars were not covered by the dealership's insurance since only cars actually titled in the name of the dealership were covered. (Tr.573). Altier also knew that Mr. Steele was serious about the threat to remove his cars. (Tr.658) Had Mr. Steele removed his cars, the dealership would be out of business and, therefore, it would not be possible to obtain insurance proceeds for "business interruption."

(Tr.679). Altier stated that on either December 24 or 25 he, John Zaragoza and Mr. Steele met together at the dealership and decided that the arson should be attempted on December 28. (Tr.578-579) However, on both December 24 and 25, Mr. Steele was with his family in Alabama. (Tr.1071,1108). Altier next claimed that at exactly 6:00 a.m. on December 28, less than a half hour after the initial fire department report of the attempted arson, Mr. Steele telephoned him from the Terrace Inn, miles away in Illinois, to say "something like I screwed up." (Tr.586) Upon hearing of the failure, Altier went back to sleep. (Tr.674) However, a few minutes later John Zaragoza called to report that the Gary police called about the arson attempt. Although Altier claims he already knew of the failure from Mr. Steele's call, he "ran out of the house" to meet John Zaragoza. (Tr.674).

Altier admitted at trial to being a liar and a thief and that he would lie anytime it was necessary to help himself. (Tr.597). Other Zaragoza employees, (Tr.756) all confirmed that Altier was a liar. Although he was originally charged with twenty-one counts in an indictment concerning the dealership, the government agreed to drop sixteen of the counts in return for his plea of guilty to the remaining counts and his testimony. (Tr.599). He had previously been found

guilty of a mail fraud scheme to divert money from an Illinois car dealership. (Tr. 560). At the Zaragoza dealership Altier would often defraud customers by selling them extended service contracts and credit life or disability insurance, collecting and keeping the premiums for himself. (Tr.557-559). He admitted to encouraging senior citizens to purchase credit life and disability insurance so that he could steal their premiums. (Tr.601).

At trial, Lorraine Hutchinson testified as an alibi witness for Mr. Steele. However, during cross-examination, theprosecutor accused her of lying, screaming to her, "Do you know the penalty for perjury?" He proceeded to ask her several times if in fact she had not been working on the night of December 27. She denied this. Flourishing a purported time card in full view of the jury, the prosecutor asked her, "Was your name at the time Lori Gagliardo?" The trial court recognized that this conduct was designed to convince the jury that Ms. Hutchinson was lying. As the prosecutor continued to waive the time card, the defense objected and a side bar was held while the jury was out of the courtroom. The prosecutor then told the Court and the defense, outside the jury's presence, that Ms. Hutchinson's employer, John Traverso, would be called to testify that she had indeed worked on December 27 from 5:46 p.m.

until 9:01 p.m. The jury heard nothing about these work hours. The testimony of John Traverso was never presented to the jury. As conceded by the prosecutor at oral argument, Mr. Traverso did come to the courthouse prepared to testify. However, he told the prosecutor that he would actually confirm Ms. Hutchinson. Accordingly, the prosecutor hurried Mr. Traverso away lest the truth become known. No effort was made to correct the false impression which the trial court recognized was left upon the jury regarding Ms. Hutchinson's credibility.

After Ms. Hutchinson testified and the defense had rested, the government called Agent Dunn to testify in rebuttal to the alibi testimony. He testified that Ms. Hutchinson had told him that she had not been to the Terrace Inn, in contradiction to her trial testimony. (Tr.1155). Agent Dunn had not been disclosed to the defense as a potential rebuttal witness under Federal Rule of Criminal Procedure 12.1(b).

Mr. Steele was also convicted on two counts of witness tampering pursuant to 18 U.S.C. Section 1512 for allegedly trying to persuade two friends, Ronald DeLisi and Nancy Vallone to lie to an FBI agent. Delisi testified that agent Dunn asked him if he knew "Jack Steele's whereabouts around Christmas of 1990." (Tr.803). Delisi told Dunn that Steele was in Alabama, testifying that Mr. Steele told him to say this and

that he wanted to "cover" for Mr. Steele. Mr. Steele was in fact in Alabama on Christmas day, 1990, and Delisi spoke with him that day on the phone. (Tr.811).

Ms. Vallone testified that she had been with Mr. Steele in the Terrace Inn on December 27. She told the jury that Mr. Steele suggested to her that she was not actually with him that day. He said, "If you don't know, you just don't know."(Tr.886). She admitted that he never asked her to lie.
(Tr.886) and she told him she would only tell the truth.

Following the jury verdict of guilt, the trial court imposed sentences of 70 month in prison for arson, 70 months on each of the witness tampering charges and 60 months on the mail fraud, all to run concurrently.

Decision of the Seventh Circuit
Court of Appeals

Mr. Steele filed a timely appeal to the Seventh Circuit. In his Brief, he raised the following issues: insufficiency of the evidence to support the malicious damages to property and witness tampering charges, the prosecution's violation of Rule 12.1(b) of the Federal Rules of Criminal Procedure for failure to disclose a witness in rebuttal to the alibi evidence, prosecutorial misconduct

in failing to correct the false impression that Ms. Hutchinson had been working and in failing to provide the favorable evidence regarding Mr. Traverso, improper admission of hearsay testimony offered by Mr. Bunting and error in setting a sentencing level of 24 on the malicious damage charge. The Seventh Circuit affirmed the convictions and sentence but failed to address all of the issues raised.

On January 13, 1997, the Seventh Circuit denied rehearing.

Mr. Steele's Convictions for Witness Tampering Should Not Stand

Mr. Steele argued before the Seventh Circuit that his convictions for witness tampering under 18 U.S.C. 1512 were not supported by either facts or law. He demonstrated that he did not ask Delisi or Vallone to lie. While the court mentioned these charges, it did not even address the convictions in its opinion, thereby affirming the convictions without any stated reasons. Mr. Steele submits that these convictions are defective. Moreover, the decision affirming the convictions is in direct conflict with the decisions of the Ninth and Second Circuit Courts of Appeal. United States v. Kulczyk, 931 F.2d 542 (9th

Cir.1991) and United States V. King, 762 F.2d 232 (2d Cir. 1985). In these two cases, the courts held that non-coercive, non-deceptive attempts to encourage a witness to lie to a government agent or grand jury, are not covered by 18 U.S.C. 1512. Although the Seventh Circuit gave no reason for its affirmance, we can assume that the court believed that any suggestion to a witness that he or she lie to a government agent or the grand jury is prohibited by 18 U.S.C. 1512. The court did not suggest, that Mr. Steele threatened, misled or attempted to bribe either Delisi or Vallone. The witnesses were fully aware of the truth and were not confused by Mr. Steele. In its brief the government admitted that both Delisi and Vallone understood Mr. Steele wanted them to give false information to a government agent. Where the witnesses are fully aware that they are being asked to give false information, the statute is not controlling.

Mr. Steele denies that he asked either witness to lie. He told Delisi to say Steele was in Alabama during the Christmas holidays of 1990 and indeed he was there. Vallone admitted that he told her to tell the truth. However, Mr. Steele is aware that it would not be appropriate to request a review of the factual record from this Court at this time. He does, however, submit that even assuming that he asked them

to lie, such requests do not violate the statute in absence of coercive, corrupt or misleading conduct.

This case presents an appropriate opportunity for this Court to resolve a conflict in the Circuits and to clarify the law on an important issue of Federal criminal law.

The Government's Failure to Disclose Its Alibi Rebuttal Witness Violated Rule 12.1(b) of the Federal Rules of Criminal Procedure And Denied Mr. Steele Due Process of Law

Mr. Steele timely disclosed that Lorraine Hutchinson would be an alibi witness, triggering the government's duty under Rule 12.1(b) of the Federal Rules of Criminal Procedure to disclose any rebuttal witnesses to contradict her. Nevertheless the government produced FBI Agent Dunn in rebuttal to falsely state that Ms. Hutchinson had told him that she had never been to the Terrace Inn and had not met Mr. Steele until a few months after the arson attempt. Defendant's counsel did not object to this undisclosed testimony. On appeal Mr. Steele requested review of this issue under the doctrine of plain error. The appellate court did not make any mention of this issue. Mr. Steele submits that the failure of the appellate court to consider

this issue results in severe prejudice. Ms. Hutchinson was a crucial witness since her alibi testimony, if believed by the jury, would have resulted in an acquittal on the arson charge. The violation of Rule 12.1(b), taken together with the government's knowing use of false information to destroy her credibility, denied Mr. Steele his fundamental right to a fair trial.

The failure to disclose that Dunn would rebut the alibi testimony insured that the defense could not properly prepare Ms. Hutchinson for her trial testimony. More importantly, it prevented the defense from recalling Ms. Hutchinson as a witness to show that Agent Dunn was not being truthful. Because no rebuttal witness was disclosed, Ms. Hutchinson was sent home after her testimony and the trial judge had made it clear that all testimony must end that day. She could not be recalled to expose the false rebuttal testimony of Agent Dunn. Thus his testimony was left standing to the extreme prejudice of Mr. Steele. The jury should have had a full opportunity to consider the credibility of the witnesses. In this case the evidence against Mr. Steele was based primarily upon the testimony of an admitted perjurer and con-man, Gerald Altier. Had the jury been give the full benefit of hearing Ms. Hutchinson contradict Agent Dunn, it is quite likely that her

credibility would have been restored. Given the critical importance of Ms. Hutchinson's credibility, the defense was severely prejudiced by not receiving Rule 12.1(b) compliance. U.S. v. Elizondo, 920 F.2d 1308 (7th Cir.)

The Seventh Circuit Allowed Prejudicial Hearsay Testimony Contrary This Court's Decision In Bourjaily v. United States

Jeff Bunting testified in the government's case in chief that on the afternoon before the arson attempt, he asked Altier why they were moving cars inside. Supposedly Altier replied that the place was going to "blow" and that Mr. Steele was going to take care of it. Mr. Steele argued in his Brief that this statement was not covered by the 801(d)(2)(E) exception to the hearsay rule since (1) Mr. Bunting was not a co-conspirator and therefore the statement was not part of any conspiracy and (2) the statement was not related to furthering the objectives of any conspiracy. The purpose behind Rule 801(d)(2)(E) is that such statements between co-conspirators are part of the flow of information helping a conspirator carry out his role. U.S. v. VanDaal Wyk, 840 F.2d 494 (7th Cir.1988). Rather than addressing this argument, the panel merely cited U.S. v. Lindeman, 85 F.3d 1232 (7th Cir.1996), for the proposition

that hearsay statements of a co-conspirator made "in the course of and in furtherance of the conspiracy are admissible." The panel merely quotes the general rule, but ignores the obvious distinction between this case and Lindeman. A conspiracy existed in Lindeman and the statements were clearly in the course and furtherance of that conspiracy. Here no conspiracy was established between Altier and anyone else. Indeed, the charge of conspiracy brought against Mr. Steele was dismissed prior to trial.

In Bourjaily v. United States, 484 U.S. 171 (1987), this Court recognized that even an experienced trial judge might give credit to an out of court incriminating statement which a defendant would be unable to explain. Yet when Bunting testified, there had been no evidence, let alone apreponderance of evidence, to establish a conspiracy or Mr. Steele's knowledge of a conspiracy. Judge Moody had conditionally admitted the hearsay statements following a pretrial hearing but then allowed Bunting to repeat the hearsay without any supporting independent evidence of any conspiracy involving Mr. Steele and without making appropriate findings of fact on conspiracy. U.S. v. Perez, 959 F.2d 164, (10th Cir.1992).

The decision of the Seventh Circuit is contrary to this Court's directives in

Bourjaily v. United States, 484 U.S. 171 (1987) and resulted in prejudice to Mr. Steele. Considering the weak nature of the evidence against Mr. Steele on the arson charge, the statement of Bunting improperly corroborated Altier's testimony, giving Altier a false credibility. Mr. Steele respectfully requests that this Court correct this failure of the Seventh Circuit to follow the decision of this Court on an important issue of law.

The Seventh Circuit Decision Is Contrary To This Court's Requirements Under Brady v. Maryland

Brady v. Maryland, 373 U.S. 83 (1963) requires the prosecution to disclose any evidence that is both favorable to the defense and material. This principle applies also to evidence concerning the impeachment of a witness. Giglio v. United States, 405 U.S. 150 (1972). In the present case such favorable evidence was knowingly withheld by the prosecution from the defense without any justification. Yet the Seventh Circuit totally ignored this fundamentally important issue of Constitutional magnitude. The most significant trial testimony was that of Lorraine Hutchinson. If believed by the jury, her testimony would have exonerated Mr. Steele. Recognizing this, the prosecution set out to destroy Ms.

Hutchinson's credibility in cross examination, repeatedly infecting the jury with the false impression that she had actually been at work rather than with Mr. Steele. The prosecutor began his cross examination by exclaiming, "do you know the penalty for perjury?" -implying she was a liar. Flourishing a time card in her face in the full view of the jury, he repeatedly asked her if she had been working on the night of the arson attempt. At oral argument, Judge Kanne asked if the time records were part of the evidence. They were not. Judge Moody clearly forbid their entry. The trial court itself conceded that the jury understood the prosecutor's repeated questions on this point to be an accusation of perjury.

As he continued to flourish the time card, the defense objected and a side bar was held. Defense counsel pointed out that the date on the card was incorrect. The court then announced a recess and let the jury out in order to straighten out the mess. The prosecutor told the judge and defense (outside the jury's presence) that Mr. Traverso would come that day and testify that she(Lorraine) worked on the 27th from 5:46 p..m. until 9:01 p.m. Shortly after this, the court told the deputy to "get the jury back in here." The jury heard nothing about hours of work.

The testimony of John Traverso was

never presented to the jury and after the guilty verdicts, Mr. Steele found out why not. As admitted by the prosecutor at oral argument, Mr. Traverso had come to the courthouse prepared to confirm Ms. Hutchinson's testimony that she did not work on the night in question, destroying the prosecution's accusation of perjury. Judge Kanne of the Seventh Circuit recognized at oral argument that if Traverso had presented the truth to the jury, the prosecutions's story "would not hang together very well," and the prosecutor readily agreed. Unwilling to permit the truth from surfacing, the government hustled Mr. Traverso from the courthouse. As Judge Kanne put it at oral argument, he was told to "Go Home!" The testimony of Mr. Traverso would have been both favorable (as admitted by the trial court and by the prosecutor at oral argument) and material to the defense. After the prosecutor's repeated badgering of Ms. Hutchinson this evidence and may well have rehabilitated Ms. Hutchinson as a credible witness. Mr. Steele respectfully requests that this Court refuse to allow the Seventh Circuit to ignore such blatant and prejudicial violation of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).

The Seventh Circuit Ignored The Government's Wilful Violation of Its Due Process Duties

By Creating The False Impression That The Alibi Witness Was Lying About Whether She Worked On The Night In Question And In Refusing To Correct That False Impression After Learning It Was False

This Court has held that due process of law as guaranteed under the 5th Amendment prohibits the prosecution from obtaining a conviction through improper means or false testimony. Napue v. Illinois, 360 U.S. 264 (1959); Kyles v. Whitley, 115 S.Ct. 1555 (1995). The prosecution here committed reversible misconduct when it failed to correct the false impression that Lorraine Hutchinson was working rather than being with Mr. Steele. In confronting Ms. Hutchinson, the prosecution faced a serious problem. Gerald Altier was an admitted liar. On the other hand, Ms. Hutchinson was capable of destroying Altier's testimony. Given a fair presentation of these two witnesses, there is little doubt about who would be believed. Yet, solely as result of the unfair and unconstitutional acts and omissions of the prosecution, the jury was not given a fair presentation.

Through its dishonesty, the prosecution was able to destroy Ms. Hutchinson's credibility. By failing to address this serious issue, the Seventh Circuit gave its stamp of approval to glaring prosecutorial misconduct. In order to discourage such

misconduct, Mr. Steele requests that this Court correct this error.

The Seventh Circuit ignored the trial record, reasoning that the impeachment of Ms. Hutchinson was meaningless because she only worked from 5:00 p.m. until 9:00 p.m. The logic of the panel appears to be that since the jury knew Lorraine Hutchinson only worked until 9:00 p.m., it would not have cared whether or not she was working on the night at issue. This would be quite reasonable but the jury never heard about the hours that she worked. The reference to her work hours came at page 1001 of the trial, while the jury was out. The jury was left with the illusion that she was working at the time she said she was with Mr. Steele and the illusion that she was a perjurer. Only this Court can undo the damage and restore reality to these proceedings by finding that the prosecutorial misconduct warrants a new trial.

Mr. Steele urges this Court to reject the kind of speculation engaged in by the trial court and the panel in their rejections of his argument. Clearly he did not receive a fair trial where the jury was left with such a damning impression of Lorraine Hutchinson, an impression created intentionally by the government.

In his Briefs and at oral argument, Mr. Steele presented the applicable facts and law to establish his right to a new trial as

a result of the prosecution's intentional withholding of exculpatory evidence. The record clearly demonstrates that:

(1) favorable evidence was withheld by the government, as was admitted by the trial court in denying a new trial and by the prosecutor at oral argument;

(2) the evidence was intentionally and knowingly withheld, indeed, Judge Woods of the Seventh Circuit recognized in chastising the prosecution at orals this is not even a close case since the prosecution actually knew of false impression during the trial but did nothing; (3) the evidence was clearly not in the possession of the defendant nor readily available to him since both he and the trial court had been told that John Traverso would be called to testify in rebuttal and would say that Ms. Hutchinson was working;

(4) the defense had no opportunity to call Traverso since testimony was ending that day; and

(5) had this evidence been disclosed to the defense and presented to the jury, a reasonable probability exists that the outcome would have been different.

The comments of Judge Wood of the Seventh Circuit during oral argument on this case were not heededby the court. She asked a compelling question - if we allow this (misconduct) to go without consequences, how can we prevent future violations of

defendants' basic rights? The fact is, we cannot. This Court has told us that in determining whether constitutional error, such as the prosecutorial misconduct in this case, may be ignored, the courts should not focus upon the overall sufficiency of the trial evidence but upon the effect the particular error may have had upon the jury. Here the repeated badgering of Ms. Hutchinson by an officer of the United States Government must certainly have effected the jury's view of her credibility.

The Seventh Circuit Decision Regarding The Sentencing Level Is in Conflict With Its Own Decisions And Those of Other Circuits

Mr. Steele respectfully requests that this Court resolve an apparent conflict between the decision of the Seventh Circuit in this case and other decisions of the Seventh Circuit, and other Circuits, regarding the sentencing standards. The Sentencing Guidelines call for a 20 level on a malicious damage conviction, but permit enhancement to 24 where the defendant "knowingly" created a substantial risk of harm or a dwelling is involved. (U.S.S.G. 2K1.4) There was no evidence that Mr. Steele acted "knowingly," but the trial court set a level 24 without any legal or factual basis. The sentencing transcript clearly reveals that the trial court

reasoned that Mr. Steele "should have" been aware of a substantial risk to fire fighters. He did not find that Mr. Steele was personally aware of a risk or ever consider Mr. Steele's frame of mind. The Seventh Circuit has repeatedly recognized that where a statute uses "knowingly," that term means with "actual knowledge," not constructive, imputed or inferred knowledge. As Judge Easterbrook recognized in Contract Courier Services, Inc. v. Research and Special Programs Adm., 924 F.2d 112 (7th Cir.1991) 'Knew' and 'did not know but should have known' are different since one refers to actual and the other to imputed knowledge. In U.S. v. Bader, 956 F.2d 708 (7th Cir.1992) the Seventh Circuit specifically held that "knowingly" means "actual knowledge" of the risk. Should, could, or might, have known or probably knew, is not enough to justify enhancement to 24. Under the Model Penal Code, the term "knowledge" as used in a criminal statute means "practically certain" that a specific result will occur. Two recent decisions of the Seventh Circuit also recognize that "knowledge" should not be merely implied when determining whether to enhance a sentence for arson. United States v. Hicks, 106 F.2d 187 (7th Cir.1997) and United States v. Beyer, 106 F.2d 175 (7th Cir.1997)

Whoever attempted the arson here was obviously trying to avoid any injury to

persons, acting in the early morning hours upon an unoccupied building with only unoccupied buildings nearby. The defendant in Bader, unlike Mr. Steele, was condemned by his own mouth, having admitted that he was aware that the building was occupied.

The Seventh Circuit, without even discussing the knowledge requirement, merely stated that the trial court correctly held that a substantial risk to fire fighters had been created. It incorrectly asserts that Mr. Steele argued that a 20 level was appropriate because no one was present, a distortion of his argument. He argued extensively that there was no evidence that he "knowingly" created a risk to justify enhancement. Indeed, the only case cited by the panel, U.S. v. Foutris, 966 F.2d 1158 (7th.Cir.1992) does not discuss whether a risk was "knowingly" created. It deals with the lesser standard of "recklessly" creating a risk and is inapplicable here. It is not authority for abandoning the requirement that a defendant must have "knowingly" created the substantial risk in order to deserve level 24.

There are numerous cases from across the country which confirm that enhancement is not appropriate under the facts of this case. See U.S. v. Dorsey, 27 F.3d 285 (7th.Cir.1994); U.S. v. Day, 943 F.2d 1306 (11th Cir.1991), cert. denied.; U.S. v. Flowers, 995 F.2d 315 (1st Cir.1993); U.S.

v. Medeiros, 897 F.2d 13 (1st Cir.1990); U.S. v. Pazos, 24 F.3d 660 (5th Cir.1994); U.S. v. Markum, 4 F.3d 891 (10th Cir.1993); U.S. v. Willey, 985 F.2d 1342 (7th Cir.1993); U.S. v. Bos, 917 F.2d 1178 (9th Cir.1990); U.S. v. Wilson, 927 F.2d 1190, (11th Cir.1991); U.S. v. Grimes, 967 F.2d 1473 (10th Cir.1992); U.S. v. Karlic, 997 F.2d 564, (9th Cir.1993); U.S. v. DiSanto, 86 F.3d 1238 (1st Cir.1996); U.S. v. Guadagno, 970 F.2d 214 (7th Cir.1992); U.S. v. Gio, 7 F.3d 1279 (7th Cir.1993); U.S. v. Turner, 995 F.2d 1357 (6th Cir.1993); U.S. v. Nguyen, 28 F.3d 477 (5th Cir.1994). None of those cases do away with the requirement that a defendant have actual knowledge of a serious risk of harm. It is not enough that fire fighters or anyone else might be hurt. It is the "knowingly" element, the defendant's actual state of mind, that is critical, a factor not even considered by the trial court when he enhanced Mr. Steele. Not a single reported case, other than this panel's decision here, allows a level 24 without evidence of defendant's actual subjective knowledge.

The decision that the fire fighters were at potential risk will alone justify a level 24 ignores the requirement of "knowledge" and is in direct conflict with the Eleventh Circuit's decision in U. S. v. Honeycutt, 8 F.3d 785 (11th Cir.1993). There the court specifically held that danger to

the lives of the fire fighters alone is not enough to warrant a level 24. There must be an actual knowledge of that risk. Honeycutt was not a case of constructive or imputed knowledge since the defendant there specifically admitted that he knew the subject building was occupied.

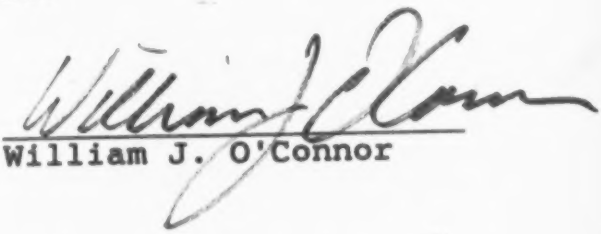
The Seventh Circuit's decision is in conflict with its own more recent decision on the question of whether potential harm to firefighters is alone enough to warrant an enhancement. In United States v. Hicks, 106 F.2d 187(7th Cir.1997), another panel of Seventh Circuit recognized that danger to firefighters is common to all fires and was certainly taken into account by the drafters of the guidelines.

CONCLUSION

Mr. Steele respectfully requests that the Supreme Court grant his Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JACKIE K. STEELE,
BY:



William J. O'Connor

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (TEN PAGES). (PAGES 1 THROUGH 10) .....App. 1

ORDER ON DENIAL OF REHEARING (ONE PAGE). PAGE 11 .....App. 11

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-3709

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACKIE K. STEELE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 93 CR 103—**James T. Moody**, *Judge.*

ARGUED NOVEMBER 8, 1995—DECIDED AUGUST 7, 1996

Before KANNE, and DIANE P. WOOD, *Circuit Judges*, and SKINNER, *District Judge.**

SKINNER, *District Judge*. The defendant Jackie K. Steele was convicted after a jury trial of the offenses of malicious damage to property by means of an explosive (gasoline), 18 U.S.C. §844(i); mail fraud, 18 U.S.C. §1341; and witness tampering, 18 U.S.C. §1512(b)(1). He appeals from his convictions and sentences, and from the denial of his motion for a new trial. As grounds for his appeal he asserts that the evidence was insufficient to warrant the guilty ver-

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* Hon. Walter Jay Skinner of the District of Massachusetts, sitting by designation.

dicts; that the statement of Jeff Bunting was hearsay and erroneously admitted in evidence; that the misconduct of the prosecution in failing to disclose evidence potentially useful to the defendant prevented the defendant from getting a fair trial; and that the defendant did not receive downward departures in sentencing to which he was entitled.

SUMMARY OF THE EVIDENCE

The defendant was a wholesaler of used cars. He would buy used cars at auto auctions and place them on consignment with various used car dealers for resale, splitting the proceeds with the dealer. He had a friend of long standing named Gerald Altier. In November of 1989, Altier and one John Zaragoza opened an auto dealership in Gary, Indiana, called Zaragoza Oldsmobile. Altier furnished the bulk of the cash to set up the dealership, and became its manager. The dealership was seriously underfunded, having only $100 in available cash on opening day. Consequently, it was in constant financial difficulty.

The defendant placed many used cars on consignment to Zaragoza Oldsmobile, which were sold in due course. The cars remained the property of the defendant until they were sold, at which time the defendant would furnish the appropriate title documents.

At various times during the following year, the defendant lent money to Zaragoza Oldsmobile to enable the dealership to meet its payroll and other operating expenses. These loans were secured by a pledge of General Electric stock worth $67,000. Prior to November, 1990, these loans had been paid and the stock returned. In November, 1990, the defendant made a loan of $24,000 to the dealership, and in December he again received the same General Electric stock as security therefor. By December, 1990, the dealership was many hundreds of thousands of dollars in debt. It had not paid its employees or its suppliers, or General Motors Acceptance Corporation (GMAC), which had financed its inventory. It did, however, renew its insurance policy, and John Zaragoza

in fact increased the coverage by adding $400,000 of business interruption insurance. The down payment on the premium was paid by the defendant. The first installment of the premium was paid in cash by Altier on December 21, 1990.

At the end of December, 1990, the defendant had approximately 25 used cars at the dealership, but as usual had furnished no invoices or title documents. These cars were of generally low value; some were so-called "clip" cars, made up of the back end of one car welded to the front end of another; some were inoperable.

Gerald Altier testified that he, John Zaragoza and the defendant agreed that the defendant would set fire to the dealership in order to collect the insurance, and that the insurance would cover the defendant's cars. On December 22, the defendant came to the dealership and delivered invoices for all of his cars to the bookkeeper, who entered them in the dealership purchase journal. The prices assigned to the cars in these invoices were seriously inflated over their true value, and these inflated values were entered on the books of Zaragoza Oldsmobile. Altier testified that this was for the purpose of creating the illusion that Zaragoza Oldsmobile owned the cars. According to Altier, the defendant assigned the value for each car. The defendant testified, however, that this procedure was carried out at the direction of Altier in order to comply with the insurance company's end-of-the-year reporting requirements, and that Altier assigned the values. It is not clear that this bookkeeping would have been effective to bring the cars under the coverage of the dealership's insurance, in the absence of title documents. This question was never resolved, because the cars were seized some time later by GMAC in satisfaction of its liens. At that time the defendant claimed to GMAC that the cars were his.

Also, on or about December 22, 1990, Altier purchased seven junk cars at an auction, using the defendant's dealer's license. These vehicles were added to Zaragoza Oldsmobile's inventory at prices inflated up to four times their cost.

It was the defendant's habit while in the Chicago area to stay at either the D-Lux Budget Motel or the Budgeteer Motel. On December 26, 1990, however, he asked his friend Ron Delisi to get him a motel room. Delisi secured a room in his own name at the Terrace Motel in Oak Forest, Illinois, a short distance from Gary, Indiana. While there was no evidence that the defendant directed Delisi to choose that motel or to use his own name, he did not correct the name when he registered at the motel later that day.

On December 27, the security guards who had previously protected Zaragoza Oldsmobile were fired. Later that afternoon, Altier ordered that all of the cars on the lot should be placed inside the building in order to facilitate snow removal from the lot. This move was contrary to prior practice. He ordered that the defendant's cars were to go in first. This turned out to be very hard work, because it was cold and snowing, and many of the cars would not start and had to be towed or pushed. An employee named Bunting complained to Altier about doing this work, and asked Altier what was going on. According to Bunting, Altier eventually replied that the dealership premises were about to be blown up, and that the defendant would take care of it.

At 5:31 a.m. on December 28, 1990, an alarm rang at the Gary Fire Department station directly across from Zaragoza Oldsmobile. A glow was visible in the window of the dealership, caused by a flare which had been burning for an indeterminate time. The firemen immediately extinguished the flare. The premises and the automobiles were awash with gasoline, presumably from five new six gallon gasoline cans and one five gallon can found inside. Windows had been opened to provide oxygen for the fire, but the ventilation was insufficient to ignite the gasoline vapor, i.e., the mixture was "too rich." If the quantity of gasoline present on the premises had ignited, there would have been a tremendous explosion, but, as it was, the damage was relatively slight.

The government introduced records of telephone calls to and from the room occupied by the defendant at the Terrace Motel:

12/27/90—7:06 a.m. to Altier. Defendant dunned Altier for repayment of the $24,000 owed to him by Zaragoza Oldsmobile. 0.4 minute.

12/27/90—1:55 p.m. from Nancy Vallone, one of the defendant's girlfriends. 1 minute. (As a result of this call, Ms. Vallone arrived later in the afternoon with Christmas cookies, and they "made love," according to the defendant.)

12/27/90—8:12 p.m. from Zaragoza Oldsmobile. 1 minute.

12/27/90—8:21 p.m. to Romayne Baker, the defendant's former girlfriend's new boyfriend. This was a harassing "hang-up" call. 30 seconds.

12/27/90—10:14 p.m. to Betty Bulsma (probably the girlfriend of Ron Delisi). 4.5 minutes.

12/27/90—10:19 p.m. to Romayne Baker, another "hang-up." 30 seconds.

12/27/90—10:51 p.m. to Romayne Baker, same as above.

12/28/90—1:07 a.m. to Romayne Baker, same as above.

12/28/90—2:05 a.m. to Romayne Baker, same as above.

12/28/90—5:59 a.m. to Romayne Baker, same as above.

12/28/90—6:00 a.m. to Gerald Altier. 2.3 minutes. Altier testified that the defendant told him that the planned arson had failed. Altier then rolled over and went back to sleep. The defendant testified that this was yet another dunning call to get the $24,000 owed him by Zaragoza Oldsmobile.

12/28/90—7:38 a.m. to Betty Bulsma. 30 seconds.

12/28/90—9:07 a.m. to Altier. 0.7 minutes.

12/28/90—9:47 a.m. to Altier. 1.8 minutes.

12/28/90—11:02 a.m. to Betty Bulsma. 30 seconds.

12/28/90—11:19 a.m. to Romayne Baker. 30 seconds.

12/28/90—2:28 p.m. from Zaragoza Oldsmobile. One minute.

The government points out that the period of telephone silence between 2:05 a.m. and 5:59 a.m. encompasses the period during which the burning flare was discovered at Zaragoza Oldsmobile.

After the defendant learned that the fire was being investigated by the FBI, he contacted several people and told them that he was home in Alabama at the time of the fire. He persuaded Ron Delisi to lie to FBI agent Dunn telling him that it was he, Delisi who had been in the Terrace Motel from the 26th through the 28th of December, and that the defendant was in Alabama during that time.

The defendant also tried to persuade Nancy Vallone to testify that she had spent the afternoon of December 27, 1990, at the Terrace Motel with Ron Delisi. In her initial interview, she lied to the FBI about her rendezvous with the defendant. The defendant kept in touch with Vallone and encouraged her to maintain the lie. When Vallone was eventually subpoenaed to a grand jury, she decided to tell the truth, although by this time the defendant was trying to persuade her to testify that she had no recollection of seeing the defendant at the critical time. The defendant said to Vallone that "if the FBI could prove that he was in town that day, he would be fucked." She had previously asked him if he had done the things he was accused of, and he had nodded his head up and down.

The defendant's principal defense was an alibi. He claimed that he had spent the early morning of the 28th in his room at the Terrace Motel playing a card game with Laurie Hutchinson, a part time waitress at Traverso's

Restaurant. Hutchinson corroborated his testimony, saying that she was with the defendant in his room from 1:00 a.m. until 5:45 a.m. on the morning of December 28th.

DISCUSSION

A. *Sufficiency of the evidence.*

The defendant argues that the evidence was insufficient to support his conviction because the government's case depended on the testimony of an unreliable witness, the co-conspirator, Altier. Even if Altier's testimony were uncorroborated, his credibility was a question for the jury, and the jury apparently believed him. *United States v. Henderson*, 58 F.3d 1145, 1148 (7th Cir. 1995). The defendant argues further that his conviction should be set aside because parts of Altier's testimony are inherently incredible. First he asserts that it was physically impossible for him to have driven from Zaragoza Oldsmobile to the Terrace Motel on the morning of the 28th between the time that the flare was put out and the 6:00 a.m. telephone call to Altier in which Altier says the defendant reported that the arson attempt had failed. The fire department responded at 5:31 a.m. and the flare was put out some time after that, leaving less than 28 minutes to make the trip, get to the motel room, call Romayne Baker, and then call Altier. Agent Dunn had timed the trip on a Friday afternoon at 33 minutes. No physical impossibility is established by this evidence. Traffic on a Friday afternoon is not the same as early on a Friday morning. (December 28, 1990 was a Friday.) There is no evidence that the defendant would have waited around for the fire department to come on the scene before heading back to the motel. The flare had been burning for an indeterminate time when the fire department arrived; as soon as the expected immediate ignition did not occur, it would be clear that the attempted arson had failed. This was clearly a jury issue.

The defendant says further that it is inherently incredible, as a matter of human nature, that he should, upon

returning from a failed arson attempt, first make a harassing call to his former girlfriend's new boyfriend before reporting the failed arson to his co-conspirator. And it was further inherently incredible that the co-conspirator, Altier, as he said, on receiving the report, should rollover and go back to sleep. This was certainly odd behavior on the part of both participants, but a jury could easily believe that neither one of these men had his priorities very well tuned.

The defendant has failed to demonstrate that the evidence against him was incredible as a matter of law as we have defined the term in our cases. *United States v. Henderson*, 58 F.3d at 1149; *United States v. Wallace*, 32 F.3d 1171, 1173 (7th Cir. 1994). The evidence was more than sufficient to support the conviction.

B. *Testimony of Bunting.*

Bunting testified that while he was helping Altier put the defendant's used cars into the Zaragoza showroom, Altier said that the place was going to be blown, and that the defendant would take care of it. While out-of-court statements are ordinarily inadmissible as hearsay, it is well established that out-of-court statements of a co-conspirator made in the course of and in furtherance of the conspiracy are admissible. *United States v. Lindeman*, 1996 WL 292101 (7th Cir. June 4, 1996). Altier's comment to Bunting is such a statement, and was properly admitted.

C. *Prosecutorial misconduct.*

Laurie Hutchinson testified that on the evening of December 27 she was at Traverso's restaurant as a patron, not as an employee; she had not worked at Traverso's that day. She then went to the defendant's motel room at about 1:00 a.m. on the 28th and played cards with him until 5:45 a.m. The prosecutor cross-examined her as follows:

Q Were you working the night of December 27th?

A No, I was not.

Q You sure you weren't working the night of December 27th?

A I don't think so.

Q Was your name at the time Laurie Gougliardo?

A Yes, it was.

At this time, the prosecutor had a paper in his hand which he attempted to offer, purporting to show that Hutchinson had worked at Traverso's on the 27th. Defense counsel pointed out that the offered record was for a year other than 1990. At a bench conference, an FBI agent told the judge that Traverso had told him that Hutchinson had worked on December 27th, 1990, from 5:46 p.m. until 9:01 p.m. The prosecutor told the judge that he would have Traverso in court to so testify. Traverso was brought to the court house, but when he arrived he told the prosecutor that he had made a mistake, and that his record was for a year other than 1990. The prosecutor then sent Traverso home without telling defense counsel that Traverso was at the court house, or what his testimony was. The defendant claims on appeal that the prosecutor's conduct deprived him of the opportunity to rehabilitate his principal witness after the prosecutor had tried to show the jury that he had impeaching evidence by waving a document around in his hand during the cross-examination recounted above.

The foregoing history was presented to the district judge at a hearing on the defendant's motion for a new trial. After a careful review of the testimony at the hearing and repeated reading of the trial transcript, the district judge concluded that the conduct of the prosecutor was reprehensible but was harmless in that it did not affect the outcome of the trial. We agree. The attempted impeachment of Miss Hutchinson was never completed and was on a collateral matter in any case, the supposed hours of work being totally irrelevant to the defendant's alibi.

In our opinion it is highly unlikely that the prejudicial effect (if any) of the prosecutor's brandishing of an unidentified piece of paper was a determinative factor in the defendant's conviction, given the plethora of testimony.

D. *Sentencing*

The defendant appeals his sentence. The district judge assessed an offense level of 24 under U.S.S.G. §2k1.4(a), on the basis that the defendant had knowingly created a substantial risk of bodily harm. The defendant claims that this was error, because there was no one present when the arson was committed. The judge correctly noted that there was a substantial risk to the fire fighters who would certainly attempt to extinguish the blaze, since Zaragoza Oldsmobile was directly across from the firehouse. *See United States v. Foutris*, 966 F.2d 1158 (7th Cir. 1992).

The district judge also declined a downward departure because of the defendant's family situation and because his criminal history overstated his true background. It was within the district court's discretion to deny a downward departure, and it would be a rare event for an appellate court to interfere with its exercise. In any case, we find no abuse of discretion in this case.

CONCLUSION

In our opinion there is no merit to the defendant's appeal. The conviction and sentence are AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—8-7-96

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 13, 1997

Before
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge
Hon. WALTER J. SKINNER, District Judge*

UNITED STATES OF AMERICA Plaintiff-Appellee, No. 94 3709 vs. JACKIE K. STEELE, Defendant-Appallant.	Appeal from the United States Court for the Northern District of Indiana, Hammond Division. No. 93 CR 103

James t. Moody, Judge

ORDER

On consideration of the petition for rehearing with suggestion of rehearing en banc filed in the above entitled cause, no judge in active service has requested a vote and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*Hon. Walter Jay Skinner of the District of Massachusetts, sitting by designation.